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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 508

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff and Respondent,
vs.
EWELL C. QUALLS,
Defendant and Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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The defendant and petitioner Ewell C. Qualls prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan as of July 23, 1968 denying defendant's application for leave to appeal from the decision of the Court of Appeals of the State of Michigan as of March 21, 1968 affirming the conviction of the charge of voluntary manslaughter in the death of Mervyn Shewell in the Circuit Court for the County of Wayne, Michigan as of October 20, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals for the State of Michigan entered March 21, 1968 is reported as 9 Michigan Appeal Reports P. 689 and is contained in the appendix and known as Exhibit A; The opinion of the Court of Appeals of the State of Michigan denying defendant's motion for rehearing and dated May 1, 1968 is contained in the appendix and known as Exhibit B; the opinion of the Supreme Court of the State of Michigan dated July 23, 1968 denying defendant's application for leave to appeal from the judgment of the Court of Appeals is contained in the appendix and known as Exhibit C; the opinion of the trial judge taking defendant's motion for a directed verdict under advisement is contained as page 16 of the statement; the motion for rehearing filed in the Court of Appeals dated March 29, 1968 is known as Exhibit D and specifies federal constitutional grounds as the basis thereof.

JURISDICTION

The judgment of the Supreme Court of the State of Michigan was entered on July 23, 1968 (Appendix, Exhibit C). The jurisdiction of the Court is invoked under 28 U.S. Code 1257 (3).

QUESTIONS PRESENTED

1. In a state criminal action where the defendant makes a motion for a directed verdict of "not guilty" at the conclusion of the People's case does the failure of the trial judge to decide such motion thereby requiring the defendant to make an election as to whether to testify on his

own behalf or remain silent constitute such coercion as to violate the Fifth Amendment to the United States Constitution?

2. Where counsel for a defendant in a state criminal action is berated by a third person in the presence of a juror and outside of the courtroom, does the failure of the trial judge to conduct an investigation of such incident or in the alternative grant defendant's motion for a mistrial a denial of the *Sixth* amendment to the United States Constitution?

3. Where while in custody a defendant in a state criminal action while making admissions to police officers demands the presence of an attorney, are such admissions admissible in evidence?

CONSTITUTIONAL AMENDMENTS INVOLVED

a. U. S. Constitution	Article V—incrimination Article VI—trial by jury Article XIV—due process
b. State of Michigan 1963 Constitution	Article I Section 17—Self incrimination Section 20—trial by impartial jury

STATEMENT

The defendant Ewell C. Qualls was charged in an information filed in the Circuit Court for the County of Wayne with the commission of the crime of manslaughter. The evidence indicated that on April 3, 1965 the Highland Park Police Department received a call that a shooting had taken place at 115 Ferris Street, Highland Park, Michigan. Upon arrival at that address at about 5:45 a.m. Police officers saw the defendant in the doorway of that home with a gun in his right hand. He motioned the officers to come into the house. Upon entering they found two bodies, one identified as Erwin Kopas and the other later identified as Mervyn Shewell. He was taken to the Highland Park Police Station; questioned for about four hours in the presence of a number of police officers; during such time he was given coffee as a stimulant. Excerpts from the trial transcript pertaining to both the circumstances surrounding such examination and the admissions made by defendant follow:

> Q. Now, witness, did you have an occasion to be present at the Highland Park Police Department with the defendant at which time certain questions were asked of him?
>
> A. Yes, sir, I was.
>
> Q. And when was that?
>
> A. The same morning, April 3rd, at approximately 8:55 a.m.
>
> Q. And who was present at that time?
>
> A. Detective Lorden and Sgt. Edward McLean, uniformed Sergeant that testified earlier.
>
> Q. The three officers and Mr. Qualls, is that correct?
>
> A. Yes.
>
> Q. All right. And as a preliminary to asking him any questions regarding this, did anyone made any statements to him?

A. Yes, I apprized him of his constitutional rights. I informed him that he need not tell us anything. Anything he does tell us could be used against him. That he was entitled to counsel. He could have an attorney present while we talked to him.

Q. All right. And what followed that preliminary statement by you to Mr. Qualls?

A. He stated, well, I, he wanted to tell us what happened, wanted, he said "I want to tell you what happened."

Q. All right. And did you make notes of that conversation, witness?

A. Yes, I did make notes.

Q. And were a copy of those notes to your knowledge served on defendant counsel?

A. I believe so.

Q. All right. Would you then, witness, tell us of your conversation or read us your notes?

Mr. Louisell: No, no. I am going to object to his reading of his notes. He can tell us of his conversation, and he can use, if he wishes, use the notes to assist him in refreshing his recollection, but I am going to object to his reading the notes. They are not a statement. They are not binding on the defendant in any shape, way or form. They are his notes.

Page 207 Transcript:

Q. Did they make any notes?

A. Not to my knowledge.

Q. What would you do? Would you write down as you went along, or would you talk for a while and then write something down?

A. Seemed like we would ask a question, a question would be asked and an answer ascertained, and then I would write the question and answer.

Q. Well, the three and a half longhand pages of your writing, your notes, and incidentally a third or so or maybe a fourth of the page is letter-head, and you didn't write on that, did you?

A. No, sir.

Q. Certainly there was more said during this hour, hour and a half, then that which is recorded in these notes, isn't there?

A. Well, we did offer Mr. Qualls coffee at one time.

Q. Well, that doesn't answer my question, of course.

A. Well, yes, everything isn't here word for word. No, sir.

Q. Well, now, you say "word for word." There is a great deal that Mr. Qualls told you at that time that you did not write down, isn't there?

A. I don't know. I'll be honest with you.

Q. You don't know. Well, we know that at least this, that he told you that the men stood up when they threatened that they would do something to his daughter, and you didn't write that down. We know that for sure anyway.

A. Yes.

Page 202 Transcript:

We asked him where he had first encountered Mr. Kopas and Mr. Shewell, and he stated at the Kendall Bar. We asked him if they had any drinks together and he said, "Yes." Asked him if they left the bar "with you" and he said, "Yes".

We asked him where he got the whiskey. He stated at a party store on Hamilton. We asked him, "You took them home with you", and he said, "I'm not going to say that. I don't know." And, "I'm not going to say *until I get my attorney in regard to this particular question.*"

Then we asked him if at any time during the evening whether they hit him, grabbed him, molested him or went through his person.

Mr. Louisell: Well, now, if your Honor please, from that point on I'm going to object to the witness reading from his interrogation because it appears at that juncture, in any event, Mr. Qualls

exercised that which is his right and his privilege and asked for an attorney. (My italics.)

Page 206 Transcript:

Q. Now, there were present at the time you spoke with Mr. Qualls, Sgt. McLean?
A. Yes, sir.
Q. And also Detective Gordon, is that right?
A. Lorden, sir.
Q. Lorden?
A. Yes, sir.
Q. And what time of the day did you question Mr. Qualls?
A. About 8:55 a.m., 9 a.m. in the morning.
Q. And this took place in the Police Headquarters at the Highland Park Police Department?
A. Yes, sir.
Q. Now, how long were you occupied with Mr. Qualls in talking to him?
A. I would have to approximate. Anywhere from an hour to hour and a half.
Q. And did you have some four pages, or three and a half pages of longhand notes, is that right?
A. Yes, sir.
Q. And you were with him sometime between an hour and hour and a half?
A. Yes, sir.

At the trial of said cause the State elected to submit to the jury the issue as to whether the act of the defendant with respect to the killing of Erwin Kopas was voluntary and without malice.

Transcript, pages 17-18:

Mr. Groat: Thank you, your Honor. Ladies and gentlemen of the jury, it is the people's theory in this case that the death of Mr. Shewell, this manslaughter that is being charged, resulted from the voluntary acts of this defendant, Mr. Qualls. That

after consuming what would apparently be a great quantity of liquor he voluntarily introduced his gun into this social activity. He voluntarily went upstairs and obtained this gun and brought it downstairs.

The voluntary act of the defendant in shooting five times. We will show you that that gun was fired five times, that Mr. Shewell was shot three times and the other man, Mr. Kopas was wounded twice. That there was no malice apparently on the part of the deceased as they were singing and at one point the other man was snoring, sleeping. From the position of the body of Mr. Shewell that he was apparently seated in this chair. That something happened to the defendant as they were seated there, perhaps worse, perhaps the extensive use of alcohol made him take this gun, stand up and fire five times at the two men who were seated or standing around the table, killing Mr. Shewell.

It is, of course, difficult to know what was in the defendant's mind at the time of the shooting because we, of course are not mind readers.

It is difficult to show what occurred in a closed room with three people, two of whom are dead and the other man here on trial, but we feel that the testimony and the evidence will show to you that this was a voluntary act on the part of the defendant, Mr. Qualls, resulting in the death of Mr. Shewell, thank you.

The admissions of the defendant as heretofore set forth were introduced in evidence subject to objection. During the trial because of the conduct of Thomas Kopas, a brother of the deceased the attorney for the defendant made a motion for a mistrial. Following is an excerpt from the transcript which sets forth in detail the nature of the motion, the proceedings following the making of such motion and its disposition.

Transcript pages 291-298:

(The jury was not present in the Courtroom, and the following proceedings took place.)

Mr. Louisell: If your Honor please, a very unfortunate thing occurred yesterday afternoon after Court had recessed and the Qualls family and I were going down in the elevator.

The Court: Pardon me?

Mr. Louisell: The Qualls and I were going down on an elevator on which as a passenger was the juror who sits in the back row with the mustache. I don't recall his name, but he had his juror button on indicating that he was a juror, and a relative of the deceased, Mr. Kopas, in a very loud, and to disturbing way, started criticizing me, referring to me as a degenerate for defending persons *such as Mr. Qualls,* and I tried to still him by suggesting to him that it was indiscreet for him to talk in that fashion in the presence of the juror, but he wouldn't be quieted, and he persisted all the time riding down the elevator in this verbal attack on me, and the attack on me isn't of any great concern to me, but in characterizing my *representation of Mr. Qualls* as being—I can't recall the exact words that he used, but it was, oh, derogatory, in any event, for defending a *person like Mr. Qualls* in this case.

I think it extremely unfortunate and obviously is a situation over which the prosecution had no control of any kind. I have no way of knowing what influence, if any, or effect, if any, the statements of this man might have upon the jury, but I feel constrained to bring it to your Honor's attention and ask for a mistrial. (My italics.)

The Court: What exactly was said now? The attack was on you personally for defending a person like Mr. Qualls. Was anything added to that indicating a basis for the person's opinion?

Mr. Louisell: The over impression, without attempting to quote the language that the man used was that it was a degenerate profession or practice. Well, he didn't use the word evil, but the connotation was that it was an evil thing for me to be defending a man like Mr. Qualls who himself was an evil person.

The Court: Is that person here in Court?

Mr. Groat: I don't know, your Honor.

Mr. Louisell: Yes, he is, your Honor.

The Court: Have him step up here, please.

What is your name, please?

Mr. Kopas: Tom Kopas, Thomas Kopas.

The Court: You are related to one of the deceased?

Mr. Kopas: Yes, I am his brother.

The Court: Where do you live, Mr. Kopas?

Mr. Kopas: 1825 Euclid.

The Court: Is that in Detroit?

Mr. Kopas: Lincoln Park.

The Court: You've heard, have you, what counsel for the defendant has had to say with regard to your remarks in the elevator?

Mr. Kopas: I have. I heard a series of lies.

The Court: Were you in the elevator?

Mr. Kopas: Yes, I was.

The Court: What did you say?

Mr. Kopas: And I'm not aware that there was any juror, which I doubt but what in essence, if I can recall to mind exactly.

The Court: Were there other people in the elevator?

Mr. Kopas: Yes, there was my wife and some counsel of his. That to my awareness was all that was in the elevator, and as to regards as what I recall exactly what I said. I said, I asked him, I said, "Are you happy in your chosen profession?" I said, "I know you're happy in your chosen profession." And I didn't recall the response that I got from him, and there was no mention whatsoever

of Qualls. I just told him that my opinion of him was very low in his type of line of work he's doing and if there was a hell anywhere he would find it and that's exactly as far as I can remember, that was the exact words. There was no mention of this particular case, or in essence it was just like he says, a personal attack on his character. He quoted it. It was my feeling at the time and it's all that was said. My wife was with me. If you'd like she could testify to what was said in that area.

Mr. Louisell: May I inquire?

The Court: Yes.

Mr. Louisell: Do you recall my telling you that it was indiscreet to speak in the presence of the jurors?

Mr. Kopas: No, I don't.

The Court: What do you do for a living, Mr. Kopas?

Mr. Kopas: I'm a crib attendant, tool crib attendant.

The Court: Mr. Kopas, I can understand your being upset because of the death of your brother and the manner in which he met his death, but that doesn't give you any right to go around deciding what other people should do for a living, particularly in public place, particularly under circumstances such as this which might well cause a mistrial in this case. That conduct might well land you in jail.

Mr. Kopas: It seems—well, I'm aware of the serious now. I never gave it any more thought and that possible repercussions could occur in such a thing. It wasn't the occupation.

The Court: Do you understand, Mr. Kopas, that if the circumstances had been reversed, that if somebody else had a gun, your brother for example, and shot Mr. Qualls, that he might well be here on trial and he might well have Mr. Louisell representing him? Do you understand that? Would you want your

brother to face a jury or a court without an attorney, or would you want an attorney if he were accused of a crime?

Mr. Kopas: I would want an attorney, sir, certainly.

The Court: And you would want probably one of the best you could get?

Mr. Kopas: Yes, sir.

The Court: One who specializes in the defense of criminal cases?

Mr. Kopas: With the exception of counsel present.

The Court: Well, you don't know that. Your whole approach to this is quite emotional, in my opinion, which is understandable, but that doesn't give you any right to speak out as you did.

Now I think you should keep in mind that you are understandably emotional about this, and in view of that that you ought to make an extra attempt to keep quiet and not enter into the trial of this case.

You are a spectator in this matter no matter how close you are to the deceased. You are still a spectator. You are not a participant in this trial. If you don't keep that in mind you will get into serious trouble, and I'm not sure yet what the extent of that trouble is.

It will depend on what happens in this case and what impression the juror got as a result of hearing that conversation. Now, you know your own makeup and your own limitations. If you feel that you can't keep quiet and can't keep yourself under control, then don't come in here, and that goes for everyone in the courtroom.

I am well aware that under all the circumstances of a case of this type emotions are going to run high. People are going to take different perspectives, different views, but that's why they have Courts and juries to decide things.

Now, it may well be that the family of Mr. Qualls takes the same view that you do of the prosecutor and the police department, which is understandable because they have a rather narrow viewpoint just as you have, but these people are both doing the job that they have to do.

And the Court has a job to do and the jury has its job, and that job must be done without any outside influence or any threats or any coercion or any intimidation, and I'll tell you right now if there's any repetition of things like this you're going to wind up in jail. Now I want to make that very clear to you. You may be seated. Bring the jury in please.

(Whereupon the jury came into the Courtroom at 10 o'clock a.m. and the following proceedings took place.)

The Court: Good morning, members of the jury, I would like to ask all of you at this time if, since the start of this case there has been any occurrence or any incident or any remarks or statement made to any of you outside of the Courtroom, or made in your presence outside of the Courtroom, which in any way would influence your thinking or your verdict in this case, or which you think might influence your thinking of your verdict in this case?

There has been drawn to the Court's attention an incident which it is alleged occurred yesterday, and a statement made which possibly might influence a juror if such a statement were made in the presence of a juror.

It is believed on one hand that juror might have been present when the statement was made. There also is a school of thought that there was no juror present. I'm just wondering if any of you recall from the time you've begun your duty on this case up until this morning if you can recall or think of any incident or occurrence outside of the Courtroom which would in any way influence your thinking or your verdict in this case, or tend to prejudice you in any way against one side or the other?

Are there any other questions that counsel would like the Court to put to the jurors?

Mr. Groat: No, your Honor.

The Court: Mr. Louisell?

Mr. Louisell: I think not, your Honor.

The Court: All right. Will you have—I think the defendant was on the stand.

Mr. Louisell: Yes, on the stand.

No response was made by any of the jurors to the questions of the Court. There is nothing in the record to indicate that defendant was satisfied with the Court's inquiry.

During the trial the assistant prosecution attorney questioned Joyce Qualls, a daughter of the defendant as follows:

Record page 192:

By Mr. Groat:

Q. Joyce, after you heard your father call, "Hazel" and "Joyce", did you hear your father say, "I'm going to kill both of you, here's one for you and one for you."

A. No.

Mr. Groat: No further questions.

Mr. Louisell: No further questions.

The Court: You may step down, witness. (Whereupon the witness was excused.)

Mr. Louisell: I wonder if your Honor please, would instruct the jury that the mere putting of a question by an attorney is certainly not evidence when you elicit a negative answer such as he elicited now in this last question. As a matter of fact it was a leading question and an improper question.

The Court: Well, it was improper in that it assumed a fact not in evidence, and I will sustain the objection. The manner in which it was asked assumed a fact not in evidence so the objection is sustained.

After the state rested the defendant made a motion for a directed verdict of acquittal for the reason that the State did not prove the elements of voluntary manslaughter.

The motion was taken under advisement. Excerpt from the record pertaining to such motion follows:

Transcript pages 235-36; 248-249:

> Mr. Louisell: If your Honor please, when the prosecution yesterday, after much deliberation and consideration concluded that he would proceed on the theory that this was a voluntary as distinct from an involuntary homicide, he undertook, as I understand the law, to prove a homicide, that occurred in the heat of passion, before blood had time to cool, with adequate provocation.
>
> I think he undertook to prove everything that is really involved, having undertaken to prove voluntary manslaughter, everything that's involved in either murder in the first or second degree, except that he need not prove premeditation or malice aforethought or malice prepense.
>
> But we have now here a situation on the record with the homicide as to which there is only one explanation, and that is the explanation that was given, such as it was, given by the defendant at the time he was interviewed by the police officers.
>
> And we have not on the record, I respectfully submit, any testimony from which the jury could infer that this was a homicide that occurred in a sudden affray where there was adequate provocation, or the other classic elements in a voluntary homicide present, and for that reason I respectfully request that the Court direct a judgment of not guilty.
>
> • • • • •
>
> The Court: I'm under the impression, perhaps erroneously so, that under the new General Court Rules, it would be permissible to take under advisement the motion for directed verdict in a criminal case unless there's some specific provision that precludes, but generally GCR are applicable to criminal cases wherever they can reasonably be applied, and my inclination at the moment is to take under advisement the motion for directed verdict.

I think there is a great deal of merit to what you say, Mr. Louisell, that the record is either totally devoid of any showing of the essential ingredients of homicide, or rather as to manslaughter, a species of homicide, if you exclude and totally disbelieve the defendant's statements to the police officer, and if you accept those you may well have justifiable homicide, but I think, generally, what is justifiable homicide depends on all of the circumstances apparent in a given case, and that suggests to me that possibly that would be a question of fact for the jury.

I don't know of any case or any rule that says when you have the following ingredients that as a matter of law the case should be taken from the jury.

My inclination at the moment—and I'll read the case you cite—my inclination at the moment is to take the motion under advisement and proceed with the case, but I will read the case you cite to me.

Mr. Louisell: All right.

The Court: But I think it's been said several times here that the dilemma of the prosecution is the plain fact of the matter is there are no witnesses to what went on except the defendant, and I don't think the jury is required to accept what he says in toto or, in the alternative, reject what he says in toto.

They may believe some of those statements and reject others and that I think would be material in arriving at the judgment of whether or not this was a justifiable homicide, and as I say, tentatively at least that area, namely whether or not it was justifiable homicide would probably be a question for the jury, but I will take under advisement, the motion for directed verdict and I will read the case you cite.

After both sides rested the defendant renewed his motion for a directed verdict. It was taken under advise-

ment. Excerpts from the transcript pertaining to such motion and its disposition follow:

Transcript pages 380-381:

> Mr. Louisell: Well, I would renew my motion at this time again for the directed judgment of acquittal, and I would only, in addition to what was said at the time of the closing of the proofs by the People bring to the Court's attention that, of course, the rule of law with respect to what force may be used in repelling an assault or a threat in one's home is different than it is elsewhere from one's home, and whereas the general rule is that a person is entitled to use such force as he, under the circumstances, as it reasonably appeared to him at the time indicated to be necessary, and not by the objective standard that might be employed looking at it in retrospect.
>
> That with respect to the use of force in a home that the law still is, I believe, that one does not need to retreat and it is still the law of the land that man's home is his castle, and he can protect himself and defend himself and his family and his property in his home by standards other than would be applicable away from home.
>
> The Court: Well, I think that the Court will adhere to the earlier ruling and take the motion under advisement at this time.

The defendant was convicted by the jury on October 21, 1966. Apparently the trial judge felt that there was merit in the claim of his counsel as to the sufficiency of the evidence. He released the defendant on personal bond. A motion for reconsideration of the motion for a directed verdict of acquittal was filed by the defendant on November 29, 1966 and denied by its trial judge on January 9, 1967. The defendant was sentenced to the State Prison on that day for a period not less than four years nor more than fifteen years. His personal bond was continued. A claim

supplied by the defendant should he take the stand. The defendant was in a quandary. Should he elect to remain silent and await the decision of the trial judge at the conclusion of the case or testify since it was possible his motion would be denied. I submit such practice places a penalty on the exercise of a person's right not to be compelled to be a witness against himself and thereby violates the Fifth Amendment and is a form of coercion and in violation of the Fifth Amendment.

> In a criminal case, where a motion or request is made for a judgment of acquittal or a directed verdict or affirmative charge in favor of accused the court has a clear duty to act on such motion or request.
>
> 23A CJS 38.

> When an accused demurs to the evidence, regardless of the prosecution's concurrence or joinder therein, the Court must act on it and either sustain it or overrule it.
>
> 23A CJS 354.

2. The decision of the Court of Appeals for the State of Michigan with respect to the question as to whether the defendant was tried by an impartial jury is in conflict with this Court's decision in the case of *Parker v. Glidden*, 87 Supreme Court Reporter 468 wherein the Court held:

> "Aside from this we believe that the unauthorized conduct of the bailiff 'involves such a probability that prejudice will result that it is deemed inherently lacking in due process.'"

In the case at bar the trial judge erred in denying defendant's motion for a mistrial or in the alternative failed to conduct a proper examination prior to the determina-

tion of such motion as prescribed by law. It is interesting to note that the trial judge at no time actually decided such motion. There are a number of conceded facts. They are:

A. Mr. Louisell was berated and maligned by Thomas Kopas, a relative of the deceased.

B. Although the juror in whose presence such conversation took place was identified by Mr. Louisell, he at no time was questioned by the trial judge.

C. The jurors at no time were advised as to the occurrence of such incident or whether if present; their judgment would be affected thereby.

There is conflict between the statements made by Thomas Kopas and Joseph Louisell. They are:

D. Mr. Louisell was positive the remarks were made in the presence of a juror.

E. Mr. Kopas was not sure that such juror was present.

F. The nature of the remarks made by Thomas Kopas.

The Court of Appeals rested its decision upon Mr. Kopas' version of the incident underlining certain words contained therein. Apparently that Court adopted the position that such remarks took place before "the juror who sits in the back row with the mustache." Let us accept Mr. Kopas' version of the incident.

> "I just told him that my opinion of him was very low in his type or line of work he's doing and if there was a hell anywhere he would find it, and that's exactly as far as I can remember that was the exact words. There was no mention of the particular case or in essence it was just like he says, a personal attack on his character."

The very fact that the Court of Appeals considered this testimony important in itself supports the claim of the defendant that the trial judge should have conducted a hearing so as to determine what actually took place in the elevator, whether the juror was present in the elevator; what actually was said by Thomas Kopas; whether such remarks affected the judgment of such juror. Absent such investigation we have an opinion rendered by an appellate tribunal which casts reflection upon the integrity of a prominent member of the legal profession. Why that Court should accept the version of Thomas Kopas as against Joseph Louisell is difficult to comprehend? In doing so it deprived the defendant of his constitutional rights; a right to have a hearing in open court as to the sufficiency of allegations constituting the basis of a judicial decision. I have underlined the remarks of Mr. Louisell contrary to that of Mr. Kopas.

In *Mattox v. U. S.*, 146 U.S. 140, 148-150 this Court held that such private communication was presumptively prejudicial.

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instruction and direction of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon

> the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Also see *Turner v. Louisiana,* 379 U.S. 473.

> In the constitutional sense trial by jury in a criminal case necessarily implies at the very least that "the evidence developed" against a defendant shall some from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross examination, and of counsel. What happened in this case operated to subvert these basic guarantees of trial by jury.

Richardson v. U. S., 360 Fed. (2) 369 is authority for the rule that a failure of the trial judge to conduct a thorough inquiry constitutes an abuse of discretion.

> The allegation of fact in the third ground of the motion that the witness Treherve engaged in a private conversation with one of the jurors must stand as confessed since no hearing was conducted. Prejudice will be assumed in the form of a rebuttable presumption. *Brown v. U.S.,* 224 (2) 845; *Johnson v. U.S.,* 207 F(2) 314; *Ryan v. U.S.,* App. DC 89 U.S. App. D.C. 328, 191 F(2) 779; *Turner v. State of Louisiana,* 379 U.S. 466, In failing to conduct "a thorough inquiry . . . to determine exactly what . . . occurred before overruling the motion the trial court abused its discretion. *Johnson v. U.S., supra,* 207 F (2) at 322."

3. The admissions by the defendant to members of the Police Department and introduced in evidence were in violation of his constitutional rights.

The trial of the case at bar was held on October 17, 1966 and consequently is subject to the rule of law enunciated in *Miranda v. Arizona,* 86 Supreme Court 1612. It

is true that the objections made to the introduction of these admissions by defendant's counsel did not rest upon Miranda but I assume he was not aware of Miranda at the time. It is to be noted that defendant had not slept that night; he had just been through a harrowing experience; he was all alone with three police officers; he was examined for nearly two hours; it was necessary to give him coffee during that period possibly to keep him awake; he asked for an attorney during such questioning which took place about four hours after his arrest; Miranda, in my opinion rendered such admissions inadmissible.

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney either retained or appointed. The defendant may waive effectuation of these rights provided the waiver is made voluntarily, knowingly and intelligently.
>
> *Miranda v. State of Arizona,* 86 Supreme Court 1612.

The record is barren of an intelligent, voluntarily and knowingly waiver on the part of the defendant.

Respectfully submitted,

FREDERICK C. KURTH,
Attorney for Defendant,
3637 Fort Street,
Wyandotte, Michigan.

HARRY RISEMAN and
JOHN MORTH,
Of Counsel,
731 Penobscot Building,
Detroit, Michigan.

APPENDIX A

OPINION OF THE COURT OF APPEALS

The People of the State of Michigan,
Plaintiff-Appellee,
v.
Ewell C. Qualls,
Defendant-Appellant.
} Calendar No. 3317

Before: Lesinski, C. J., J. H. Gillis and T. G. Kavanagh, JJ.

Lesinski, C. J.

The defendant, Ewell C. Qualls, was convicted by a jury of the crime of manslaughter* and sentenced to prison.

The facts reveal that on April 3, 1965, the Highland Park police department was summoned to an address in that city to investigate a shooting. Upon arrival, the officers observed the defendant in the doorway with a revolver in his hand. The defendant motioned for the police to enter, whereupon the bodies of one Ervin Kopas and Mervyn Shewell were found therein. The defendant was subsequently arrested, stood trial and was convicted of voluntary manslaughter in the death of Mervyn Shewell.

On appeal, as his first assignment of error, the defendant contends the trial court abused its discretion by failing to grant a motion for a mistrial when it was brought to the court's attention that the brother of Ervin Kopas had heaped verbal abuse on defense counsel, allegedly in the presence of a juror. The brother was questioned by the

* CL 1948, §750.321 (Stat Ann 1954 Rev. §28.553).

court in the absence of the jury about the incident and his account in response was as follows:

> "The Court: Were there other people in the elevator?
>
> "Mr. Kopas: Yes, there was my wife and some counsel of his [defendant]. That to my awareness was all that was in the elevator, and as to regards as to what I recall exactly what I said, I said, I asked him, I said, 'Are you happy in your chosen profession?' I said, 'I hope you're happy in your chosen profession,' and I didn't recall the response that I got from him, and *there was no mention whatsoever of Qualls.* I just told him that my opinion of him was very low in his type of line of work he's doing and if there was a hell anywhere he would find it, and that's exactly as far as I can remember, that was the exact words. *There was no mention of this particular case,* or in essence it was just like he says, a personal attack on his character." (Emphasis supplied.)

The trial judge recalled the members of the jury and inquired of them collectively, "if you can recall or think of any incident or occurrence outside of the courtroom which would in any way influence your thinking, or your verdict in this case, or tend to prejudice you in any way against one side or the other." This inquiry failed to elicit an affirmative response from any of the jurors, whereupon the judge asked if counsel for the respective sides had any other questions for the jury. Both counsel stated they had no further questions.

The defendant on appeal contends that the trial judge abused his discretion in denying the motion for a mistrial, and further, that the investigation made by the trial judge concerning the verbal attack on defense counsel, reportedly

in the presence of a juror, was not complete enough to ascertain whether defendant had been prejudiced by the incident. The record does not reveal the abuses the defendant herein urges.

When the trial court learns of an incident, such as happened in this case, arising during the progress of the trial, fairness to the defendant requires that the trial judge ascertain its prejudicial effect. And whether or not the circumstances establish that a mistrial should be declared rests in the sound discretion of the trial judge. *People v. Bigge* (1941), 297 Mich 58. Moreover, a mistrial should not be declared in consequence of any mere irregularity which is not prejudicial to the rights of the defendant. *People v. Watson* (1943), 307 Mich 596.

In *People v. Schram* (1966), 378 Mich 145, our Supreme Court was confronted with the same problem as in the instant case. The rule adopted in *Schram, supra,* was that not every improper contact with a jury presents grounds for a mistrial and the appellate court will reverse only when prejudice is affirmatively shown or facts clearly establishing the inference that it occurred from what was said or done. See, also, *People v. Nick* (1960), 360 Mich 219.

Assuming *arguendo* that the trial judge should have been more extensive in his inquiry, the position that defendant herein urges is certainly inconsistent with his position at trial, that he was satisfied with the court's inquiry and had no further questions. This Court views the defendant's present position as an afterthought and that by failing to make further requests of the trial judge, the defendant has effectively waived the opportunity to do so. It has been said on good authority that "It is only in furtherance of good practice to hold that a defendant who chooses to take the chances of an acquittal on the merits,

without complaining of irregularities at the trial, waives his objections." 2 Gillespie, Michigan Criminal Law and Procedure (2nd ed), §715, p. 909. We find that the inquiry of the trial judge, while not exhaustive, was sufficient under the facts presented to satisfy the spirit of *Schram, supra,* and justified the denial of the motion for a mistrial.

In his second assignment of error, the defendant contends that certain admissions elicited from him during in-custody interrogation were improperly admitted into evidence. In support of his contention, he directs our attention to *Miranda v. Arizona* (1966), 384 US 436 (86 S Ct 1602, 16 L ed 2d 694, 10 ALR 3rd 974). The defendant's position is persuasive in that prior to questioning by the police, although he was advised of his right to counsel, he was never advised that this right included "retained or appointed" counsel. Certainly advising the defendant that he had a right to counsel without informing him that counsel would be appointed if he was without funds is contra to the spirit and the language of *Miranda, supra.* See also, Harvard Law Review, 1966-67, p. 201, vol. 80:91.

The position that the defendant maintains on appeal is again, however, inconsistent with his posture in the lower court. The record reveals that the statements made by defendant which he now contends were inadmissible at the trial, were, in fact, carefully scrutinized by him when defense counsel cross-examined the people's police witnesses. We will not speculate as to the purpose of defense counsel's approach but find that in the absence of an objection in the court below, he is in no position to complain. *People v. Bauman* (1952), 332 Mich 198.

It is settled law that the failure to object to alleged errors in the lower court precludes their being raised for

the first time on appeal. However, in *People v. Paul F. Baker* (1967), 7 Mich App. 471, 475, this Court stated:

> "However, this Court in observing this general rule, will exercise its 'prerogative of searching for error which reflects clear injustice.' *People v. Hicks* (1966), 2 Mich App. 461, 463. 'The inherent power of this Court to prevent fundamental injustice is not limited by what appellant is entitled to as a matter of right.' *People v. Dorrikas* (1958), 354 Mich 303, 316."

Viewing the entire record, we find that the defendant has suffered no "clear injustice" and his failure to raise an objection in the trial court precludes him from raising it here.

Lastly, the defendant contends that the record fails to demonstrate that the jury verdict was supported by the evidence and further that his motion for a directed verdict, made at the close of the prosecution's case, should have been granted. The defendant's motion was based upon the allegation that the prosecution had failed to introduce testimony from which the jury could reasonably infer that the element of provocation necessary for the crime of voluntary manslaughter was present.

At trial, the court took the defendant's motion under advisement and defense counsel then presented his case. The defendant testified as to the circumstances surrounding the homicides. The defendant's testimony, this Court finds, sufficiently warranted the denial of the motion and supported the ultimate verdict of guilty.

On direct examination the defendant testified:

> "Q. And what did Larry [the decedent Shewell] say?

A. Well, just like he said, 'I can't do nothing with him' and he said, 'Besides its a hell of a note to have somebody in your house and then call the cops on them and start arguing.' "

The defendant expressly admitted on direct examination to having an argument with the decedent Shewell as follows:

"Q. What about Mr. Shewell? What, if anything, did he do when Mr. Kopas started toward you around the table?

A. Well, I don't know whether he was after Kopas or coming to help him. I don't know. I know we was in an argument though. We had been arguing.

Q. Well, when had you argued with Mr. Shewell?

A. Well, about the same time that when he said, 'I'm going upstairs,' Kopas.

Q. What did Shewell say?

A. Well, he was kept on hollering about going to call the cops."

Further on cross-examination the defendant testified:

"Q. What happened then? Was Larry seated or standing at the time?

A. Well, when it first started he was seated, and when I told him, I said, 'Well, if you don't get him out of here I'm going to call the police,' then that kind of irked him, and started you know, 'Pretty good, sitting here drinking with you, and call the police on us.'

Q. Larry said that?

A. Yes, and we got into quite a little argument there about it.

Q. You are Larry?
A. Yes."

The direction of a verdict is, of course, addressed to the sound discretion of the trial court, and the trial judge should not direct a verdict where there is sufficient evidence to submit the case to a jury and justify a conviction. *People v. Sullivan* (1939), 290 Mich 414. In the instant case, although at the time of defense counsel's motion the prosecution had not conclusively demonstrated the presence of provocation, the subsequent testimony of the defendant supplied the deficiency. When testimony supporting the prosecution's theory is subsequently supplied by the defendant, the trial judge is correct in denying a motion for a directed verdict. *People v. Barlow* (1903), 134 Mich 394.

The defendant's testimony revealed that the three men had been drinking for several hours prior to the homicide. In addition, the aforementioned testimony revealed that "quite a little argument" had developed. It was therefore not unreasonable for the jury to infer that the alcohol, coupled with the developing argument, were the ingredients which caused the defendant to respond rashly and without deliberation. The question of the defendant's state of mind at the time of the homicide was properly a question of fact for the jury, and based upon the record we find no reason to interfere with their conclusion. See 3 Gillespie, Michigan Criminal Law and Procedure (2nd ed), §1665, p. 2007.

Affirmed.

APPENDIX B

ORDER DENYING MOTION FOR REHEARING

(Michigan Court of Appeals)

At a session of the Court of Appeals of the State of Michigan, held at the Court of Appeals in the City of Detroit, on the 29th day of April in the year of our Lord one thousand nine hundred and sixty-eight.

Present the Honorable T. John Lesinski, Presiding Judge, John H. Gillis, Thomas Giles Kavanagh, Judges.

In this cause a motion for rehearing is filed by defendant-appellant and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

It is ordered that the motion for rehearing be, and the same is hereby denied.

State of Michigan—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 1st day of May in the year of our Lord one thousand nine hundred and sixty-eight.

Ronald L. Dzierbicki,
Clerk.

APPENDIX C

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL

(Michigan Supreme Court)

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 23rd day of July in the year of our Lord one thousand nine hundred and sixty-eight.

Present the Honorable John R. Dethmers, Chief Justice, Harry F. Kelly, Eugene F. Black, Thomas M. Kavanagh, Michael D. O'Hara, Paul L. Adams, Thomas E. Brennan, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and the same is hereby denied, as defendant and appellant has failed to persuade the Court that he has a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous. It is further Ordered that the bond filed by defendant and appellant pursuant to an order of the circuit court for the county of Wayne, dated February 6, 1967, which was continued by order of this Court dated May 10, 1968, be cancelled.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 23rd day of July in the year of our Lord one thousand nine hundred and sixty-eight.

Harold Hoag,
Deputy Clerk.

APPENDIX D

MOTION FOR REHEARING

(Michigan Court of Appeals)

NOTICE

TO: William L. Cahalan,
Prosecuting Attorney,
City-County Building,
Detroit, Michigan 48226.

Please take notice that the within motion for rehearing will be heard in the Court of Appeals for the State of Michigan on the 16th day of April, 1968 at 10:00 a.m. in the forenoon in accordance with the rules of that court.

Riseman, Lemke & Piotrowski,
Attorneys for Defendant,
By: Harry Riseman,
731 Penobscot Building,
Detroit, Michigan 48226.

Dated: March 29, 1968.

MOTION FOR REHEARING

Now comes the defendant and moves this Court to enter an order granting him a re-hearing or in the alternative either grant his motion for acquittal directed to the trial judge or reverse the conviction entered in the lower court and award him a new trial and for the following reasons:

1. That defendant was denied his rights accorded him by the constitution of the United States and especially the Sixth and Fourteenth Amendments thereof.

2. That the defendant was denied his rights accorded him by the constitution of the State of Michigan and especially Article I, Section 17 thereof.

3. That the trial judge should have granted defendant's motion for a mistrial as a matter of law since one accusing his counsel as being "A degenerate for representing him" in the presence of a juror "involved such a probability that prejudice would result and was deemed lacking in due process."

4. That the trial judge as a matter of law was required to conduct an examination of the charges contained in the motion for mistrial including the involved juror.

5. That this Court made a factual finding with respect to such charges based solely upon the statement of Mr. Kopas, the party accusing trial counsel in the presence of a juror.

6. That the trial judge was without authority to take a motion for acquittal at the conclusion of People's case under advisement.

7. That the defendant was denied his constitutional rights when such was done and when he was required to make an election as to whether he should rest upon his motion or testify in open court.

8. That since such motion was meritorious and should have been granted, the trial judge could not make a determination thereof subsequent to the trial and using defendant's testimony as a basis for its denial.

9. That Miranda v. Arizona is applicable to the statements made by defendant to police officers at the

time of his arrest and could not be waived by his counsel.

10. That defendant was denied the right of an impartial trial by jury accorded him by the constitution of the United States and the constitution of the State of Michigan.

This motion is based upon the files and records of this Court; supporting brief; and affidavit of Harry Riseman which is made a part hereof.

Riseman, Lemke & Piotrowski,
Attorneys for Defendant,
By: Harry Riseman,
731 Penobscot Building,
Detroit, Michigan 48226.

Dated: March 29, 1968.

AFFIDAVIT OF HARRY RISEMAN

State of Michigan,
County of Wayne—ss.

Harry Riseman being duly sworn deposes and says that he is the attorney for the defendant in the above entitled cause and that he verily believes that the defendant is entitled to a rehearing for the reason set forth in the petition now on file with this court.

Harry Riseman.

Subscribed and sworn to before me this — day of March, 1968.

.....
Notary Public, Wayne County, Michigan.
My commission expires .....

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FILED
OCT 2 1968
JOHN F. DAVIS, CLERK

No. 508

In The

SUPREME COURT OF THE UNITED STATES

October Term 1968

EWELL C. QUALLS,
Petitioner.

vs.

PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

FRANK J. KELLEY,
Attorney General

Robert A. Derengoski
Solicitor General

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Lansing, Michigan 48902

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PEOPLE OF THE STATE OF MICHIGAN,
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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Respondent People of the State of Michigan oppose the Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan relative to its order dated July 23, 1968 denying defendant's application for leave to appeal from the decision of the Michigan Court of Appeals entered March 21, 1968 and order denying rehearing dated May 1, 1968 for the reasons set forth herein.

OPINIONS BELOW

There are no opinions of the courts below that touch on the first question raised by petitioner. The question in its present form was apparently not fully articulated until

the motion for rehearing was filed in the Michigan Court of Appeals (Petitioner's Appendix D). Therefore while the orders of that Court and of the Michigan Supreme Court (Petitioner's Appendix B & C) are applicable to that issue, they contain no specific discussion of it.

QUESTIONS PRESENTED

The respondent disagrees with the statement of questions presented by petitioner because they are based on facts contrary to or different than those shown by the transcript. Respondent submits that the questions, if such are otherwise properly before this Court, should be framed as follows:

1. Where the state trial court reserves decision on a motion for a directed verdict of acquittal made at the conclusion of the People's case and the defendant, without objecting to the reservation, presents evidence, does the use of all the evidence to sustain the conviction violate the constitutional prohibition against self-incrimination?

2. Does a state trial court's denial of a motion for mistrial for the alleged berating of defendant's counsel by an outsider outside the courtroom in the presence of a juror violate the defendant's right to an impartial jury where the court's investigation showed the jurors presence to be disputed, a joint questioning of the jurors showed no prejudice or influence resulting from the alleged occurrence, and an opportunity for further questioning was refused by defendant?

3. After an intelligent, knowing and voluntary waiver of the right to remain silent and to counsel during a state custodial interrogation, does the refusal of the defendant to answer a particular question until he gets counsel make admissions in response to other questions inadmissible?

STATEMENT OF THE CASE

Respondent is unable to accept many of the statements and conclusions in petitioner's statement of the case. It also feels additional facts are relevant. It accordingly invites the Court's attention to the following:

1. Concerning the motion for directed verdict (Question 1).

It was not definitely held by the lower court that there was insufficient evidence at the time of the motion for directed verdict at the close of the people's case to justify denial of the motion and sustain a verdict against the defendant. The trial court simply stated that the presence of provocation was not "conclusively demonstrated" (Petition, Appendix A, p. 31).

After reserving decision on the motion for directed verdict at the close of the people's case, no express objection to the reservation by defendant was made (p. 249).*

2. Concerning the Jury (Question 2).

The Michigan Court of Appeals did not hold that an investigation was not necessary when improper comments in an elevator in the presence of a juror were alleged. It held that the trial judge must ascertain the prejudicial effect of the occurrence (Petition, Appendix A, p. 27).

An investigation of the incident was made (pp. 291-298)

*Page numbers without further designation refer to the transcript of testimony at trial.

and it was learned that the presence of the juror in the elevator was disputed as well as the content of the statements. The jury was asked if it was influenced or prejudiced by any alleged event alleged to have occurred at the indicated time. Counsel for petitioner indicated petitioner was present during the alleged occurrence, but the remarks were not made to petitioner directly. Despite an opportunity for further inquiry, petitioner's counsel declined and proceeded without further objection (p. 298).

3. Concerning the Admissions (Question 3.)

The Court of Appeals did not hold that statements made while in custody by one requesting an attorney are admissible. (See Petition, Appendix A). The interrogation lasted approximately 1½ hours (pp. 206, 207 and 214). Petitioner was offered coffee (p. 207); he was not "given coffee as a stimulant."

The interrogation was preceded by informing the petitioner of his right of silence and of counsel (p. 197). Immediately after the warnings petitioner insisted on continuing, as shown by the following which constitutes a knowing, intelligent and voluntary waiver:

> "Q. All right. And what followed that preliminary statement by you to Mr. Qualls?
>
> "A. He stated, well, I, he wanted to tell us what happened, wanted, he said 'I want to tell you what happened'." (p. 197)

Rule 785, Michigan General Court Rules of 1963, requires notice of admissions to defendant prior to trial. A pre-trial procedure for preventing improper admissions or statements was provided by such rule. Notice of Hear-

ing for such purpose is found at Vol. 1, Record on Appeal, 144. The Court of Appeals found an absence of objection to such admissions (Petition, Appendix A, p. 28). The only objection is shown at page 202 when petitioner refused to answer a particular question. On page 203, it appears this objection may have been withdrawn.

On cross-examination of the people's witnesses, petitioner carefully scrutinized the petitioner's statements during custodial interrogation (Petition, Appendix A, p. 28). One witness present at the interrogation was cross-examined concerning the petitioner's statements despite the fact that he did not testify concerning them on direct examination (pp. 215-223).

ARGUMENT

I.

USE OF DEFENDANT'S EVIDENCE PRESENTED AFTER DECISION ON A MOTION TO ACQUIT IS RESERVED, TO SUSTAIN HIS CONVICTION IN A STATE COURT, DOES NOT INFRINGE RIGHTS AGAINST SELF-INCRIMINATION.

Since the Michigan Court of Appeals did not squarely decide that there was no evidence by which a jury could find the element of provocation at the close of the people's case (it found provocation "not conclusively demonstrated"), it could be argued that there was sufficient evidence by which the jury could find guilt beyond a reasonable doubt without the testimony of the defendant-petitioner. Had the constitutional question been presented before the motion for rehearing, the determination of this point would undoubtedly have been more conclusive. This would furnish an independent ground to sustain the state decision.

In regard to the issue as stated, petitioner did not specifically object to the reservation of decision of the motion. He proceeded to present evidence without further comment. The self-incrimination allegation was apparently not argued to the trial court. The issue may not, therefore, have been properly preserved. In any case, however, respondent submits that no issue of self-incrimination is involved in reservation of decision on a motion to acquit and use of any evidence that defendant later presents to sustain the conviction.

There is a split of authority on whether decision on a

motion to acquit can be reserved. An example of a case approving the practice is *State* v. *Shiver,* 174 So 2d 778 (Fla. 1965). Among the cases disapproving the practice are *People* v. *Matu,* 5 Ill. App. 2d 577, 126 NE 2d 403 (1955); *Bennett v. People,* 155 Col. 101, 392 P 2d 657 (1964) and *Jackson v. United States,* 250 F 2d 897 (5th Cir. 1958).

There is a further split of authority on the question of whether the defendant's evidence presented after reservation may be considered. In the case of *denial* of a motion to acquit, the majority of decisions hold that any later testimony by the defendant may be considered and that objection to the denial is then waived by the defendant *(United States v. Calderon,* 348 US 160, 75 SC 186, 99 L. Ed 202 (1954); "Power and duty of court to direct or advise acquittal in criminal case for insufficiency of evidence," 17 ALR 910, 925; *Jackson v. United States,* 250 F 2d 897 (5th Cir. 1958).

In *United States v. Calderon,* 348 US 160, 75 SC 186, 99 L. Ed 202 (1954) where the defendant introduced evidence in his own behalf after denial of his motion to acquit at the close of the government's case, this court held that the reviewing courts could seek corroborative evidence in the proof of both parties. It held that by introducing evidence the defendant waived his objections to the denial of his motion to acquit (p. 164 n.1).

The waiver doctrine has been said by some courts to apply where evidence by the defense is presented after *reservation* of decision on a motion to acquit as well as after *denial* of such a motion. This dictum is found in *Moore v. United States,* 375 F 2d 877 (8th Cir - 1967) cert den. 389 US 844 and *United States v. Rosengarten,* 357 F 2d 263 (2nd Cir - 1966).

A minority of the cases refuse to find a waiver in defendants' introducing evidence after a motion to acquit at the end of the government's case is denied. This occurred in *Cephus v. United States,* 324 F 2d 893 (DC Cir 1963) where a co-defendant's testimony implicated appellant and he had to testify to contradict the testimony. The Court said that appellant did not voluntarily waive consideration of his motion in the light of the proofs at the time it was made but was forced to testify because of his co-defendants' testimony. In *State v. Fiorello,* 36 NJ 80, 174 A 2d 900 (1961), it was held that the validity of denial of a motion to acquit at the end of the state's case is tested in the light of evidence at that time without reference to corroborative evidence introduced during defendant's case. (The case concedes many cases hold to the contrary).

It should be noted that even in the cases refusing to recognize waiver and upon review, considering only the evidence when the motion is made, the decision is not based on the Fifth Amendment protection against self-incrimination. The reason is generally given that procedural rules in the jurisdiction require the result.

The Court should be informed, however, that some authorities have indicated a near involvement of self-incrimination principles. In *State* v. *Bacheller,* 89 NJL 433, 98 A 829 (1916) it was said that the waiver rule comes perilously close to compelling the accused to convict himself. (This argument is not repeated in the later New Jersey case of *State* v. *Fiorello,* 36 NJ 80, 174 A 2d 900 (1961), however, which also held that defendant's evidence should not be considered in testing the motion.) The *Bacheller* case was quoted in *Cephus* v. *United States,* 324 F 2d 893 (D.C. Cir. 1963), but the presence of co-defendants and no voluntary waiver distinguish that case. An article on the subject sees no distinction between denial and reser-

vation and argues against application of the waiver doctrine where the defendant presents evidence after the motion is made. The argument again is not based on the constitution's protection against self-incrimination (although the *Bacheller* case is cited) but on the advantages of requiring the prosecution to be responsible for the whole case ("The motion for acquittal: A Neglected Safeguard", 70 Yale Law Journal 1151.) No case, however, has been found which disapproves the waiver doctrine expressly because of violation of guarantees against self-incrimination.

It is, therefore, apparent that appellant's first reason for granting the writ is unsupported and is contrary to numerous decisions which either approve the waiver doctrine (the vast majority) or in disapproving it, adopt other reasons for doing so. It is clear that no right protected by the United States Constitution or laws is involved in appellant's first contention.

II.

THE DENIAL OF MISTRIAL FOR THE ALLEGED BERATING OF DEFENDANT'S COUNSEL BY AN OUTSIDER OUTSIDE THE COURTROOM DID NOT VIOLATE DEFENDANT'S RIGHT TO AN IMPARTIAL JURY WHERE AN INVESTIGATION SHOWED THE JURORS' PRESENCE TO BE DISPUTED AND NO PREJUDICE OR INFLUENCE RESULTED, AND AN OPPORTUNITY FOR FURTHER QUESTIONING WAS REFUSED BY DEFENDANT.

The transcript (p. 291-298) clearly shows that the trial court conducted an investigation when it was alleged that improper remarks may have been made in the presence

of a juror. At the conclusion of the trial court's questioning defendant's counsel was offered the opportunity to put questions to the jurors, but did not do so. The indication by the Michigan Court of Appeals that this was a waiver of any irregularities is not unreasonable under such circumstances.

The principles articulated by the Michigan Court of Appeals on this issue (Petition, Appendix A, p. 27) are in accordance with the decisions of this court and other courts which have been faced with the issue. It states that upon learning of such an incident, the trial judge must ascertain its prejudicial effect. Whether a mistrial is required rests in the judges discretion. A mistrial should not be declared for a mere irregularity which is not prejudicial. If prejudice is shown by the judges' inquiry or the facts clearly establish the inference that it occurred, mistrial should be granted. It is difficult to see how petitioner could find error in such principles.

The investigation showed that the presence of the juror was disputed. The remarks were made by an outsider with no official connection with the proceedings. The remarks were apparently directed at counsel despite the fact that counsel stated that petitioner was present (p. 291). A joint polling of the jury after it was told the approximate time and nature of the incident, failed to indicate any influence or prejudice. Counsel for defendant refused to offer further questions. It is submitted that the trial court did not infringe sixth amendment rights in its exercise of discretion in refusing a mistrial.

This case is in no way similar to *Parker* v. *Glidden*, 385 US 363, 87 S. Ct. 468, 17 L. Ed 2d 420 (1966) relied on by petitioner. Here an outsider instead of a public officer made the alleged statements. The facts here do not involve

such a probability that prejudice resulted that denial of the mistrial led to a proceeding inherently lacking in due process. No juror testified he was influenced.

The joint questioning of the jury was not clearly erroneous. Such technique was found not to be an abuse of the trial court's wide discretion in *United States* v. *Miller*, 381 F 2d 529 (2nd Cir - 1967) where it was alleged that a juror had been threatened at a social gathering but joint questioning of three jurors produced negative answers on possible influence or prejudice.

It is therefore submitted that no sixth amendment rights of petitioner were infringed by the denial of mistrial. The exercise of discretion cannot be said to be clearly erroneous. Additionally, the principles used by the reviewing court are in accordance with prevailing law and thus examination of this issue by this Court would not appear to be necessary.

Respondent submits that this question does not warrant the grant of certiorari.

III.

AFTER AN INTELLIGENT, KNOWING, AND VOLUNTARY WAIVER OF THE RIGHT TO REMAIN SILENT AND OF THE PRESENCE OF COUNSEL, REFUSAL TO ANSWER A PARTICULAR QUESTION DOES NOT MAKE ADMISSIONS IN RESPONSE TO OTHER QUESTIONS INADMISSIBLE.

Before analysis of the main portion of this issue, the warnings must be briefly discussed since the testimony thereon does not show that petitioner was advised of his

right to appointed counsel if he was indigent. (See Petition, Appendix A, p. 28). Of course, petitioner did not raise an objection to any admissions *(Ibid)*. One cannot be sure therefore that closer questioning would not have revealed that such a warning was given.

Additionally, it has been held that where one has retained counsel at trial and on appeal, he clearly is not indigent and therefore need not have been warned of the right to appointed counsel. (*United States* v. *Fisher*, 387 F 2d 165 (2nd Cir - 1967); *United States* v. *Messina*, 388 F 2d 393 (2nd Cir 1968) citing *Miranda* v. *Arizonia*, 384 US 436, 473, n. 43, 86 S Ct 1602, 16 L. ed 2d 694 (1966).

Finally, petitioner does not raise this issue in his petition and thus this issue is waived and not before the Court (See generally 2 U.S. Supreme Court Digest Ann. "Appeal & Error," Sec. 1092). Thus proper warnings to petitioner should be assumed herein.

It is submitted that petitioner has also waived any right to complain of later events in the custodial interrogation. Although warned prior to trial under Michigan General Court Rule 785 of admissions (See Notice of Hearing for such purpose, Vol 1, Record on Appeal, 144) petitioner made no effort to exclude them in such a proceeding. In addition, defendant carefully cross-examined the state's witnesses about the admissions and with one witness elicited testimony on cross-examination about the admissions when the witness had not testified on direct examination concerning them. It is obvious that defendant was attempting to present his defense by cross-examination and thus avoid testifying. Under those circumstances, it is not surprising that the Court of Appeals found that petitioner was precluded from raising this question.

Petitioner's allegation that the record is barren of an intelligent, voluntary and knowing waiver is inaccurate. One is clearly shown at p. 197 of the transcript where petitioner insisted, after the warnings, that he tell the police "what happened."

Refusal to answer certain questions does not make the answer to others inadmissible. In *Santoro* v. *United States*, 388 F 2d 113, (9th Cir - 1967), the appellant stated he wanted his attorney present before answering along certain lines. He had been advised of his right to counsel, but proceeded to answer other questions. The questioning agent was careful to end any line of questioning with respect to which appellant indicated he wished to consult counsel. It was held that the appellant was not denied his right to counsel under such circumstances. While the decision is pre-*Miranda*, since the trial preceded that case, and while other aspects of the opinion are now questionable in the light of subsequent decisions of this Court, the ruling on this point seems relevant and properly applicable to the present case. Surely the refusal to answer one question without counsel did not cancel out the effect of petitioner's otherwise insistent disposition to tell the officers "what happened." It is, therefore, submitted that petitioner's right to counsel was not infringed in this case and the petition is without merit on this issue.

In the present case, *Miranda*, is apparently applicable since the trial took place in October of 1966 (Petition p. 17); *Johnson* v. *New Jersey*, 384 US 719, 16 L ed 2d 882, 86 S Ct 1772 (1966). The interrogation took place on April 3, 1965, however (Petition, p. 4). Thus the state did not have the benefit of the *Miranda* decision at the time of interrogation. This, of course, does not make *Miranda* inapplicable, but does show an additional reason

for the refusal of certiorari. *Miranda* is now available to guide the state in the area of law involved in petitioner's third issue.

CONCLUSION

The decision below is clearly correct. These is no conflict of decision on the three issues presented. No federally protected rights of petitioner have been infringed. It is submitted that the granting of certiorari is unnecessary.

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 508

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff and Respondent,

vs.

EWELL C. QUALLS,
Defendant and Petitioner.

REPLY BRIEF BY PETITIONER

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Defendant and Petitioner.

REPLY BRIEF BY PETITIONER

1. Respondent in its brief has been eminently fair in its presentation of the issues involved in this case. It is important to note that Michigan law does not provide for a Court to take a motion for acquittal under advisement. This is likewise true of the Federal Courts. See Rule 29 of Federal Criminal Procedure. Section 27.1461 Michigan Statutes Ann. reads as follows:

> Hereafter in all civil actions at law, in courts of record if the defendant at the close of plaintiff's case or either party shall at the close of the testimony, and before the case is submitted to the jury, request the court for a directed verdict in his favor, the Court may reserve his decision thereon, and

submit the case to the jury under proper instructions as to the law applicable to the case.

Rule 785.1 of the Michigan General Court Rules provides as follows:

> The provisions of the Rule of Civil Procedure shall apply in criminal cases, except as otherwise provided by rule and statute and except when it clearly appears that they apply to civil actions only, or where statute or special court rule provide a different procedure.

The trial judge at the time he took such motion for acquittal under advisement was doubtful as to his power to do so. (P. 15 of Petitioner's Brief). The Michigan Court of Appeals in its opinion cited the case of *People v. Barlow*, 134 Mich. 394 as one in point. (P. 31 of Petitioner's Brief). In that case a motion for acquittal was denied and the decision therein is in harmony with those cited by respondent in its brief. Furthermore the Supreme Court found "In our opinion, there was a prima facie case made out by the people." We have then a situation in the case at bar where the trial judge in violation of Michigan law took a motion for acquittal under advisement and at the time when the Michigan Court of Appeals was of the opinion "The prosecution had not conclusively demonstrated the presence of provocation". (P. 31 Petitioner's Brief).

Does such act constitute a violation of the Fifth Amendment protection against self incrimination? Did such practice place a penalty on the exercise of a person's right accorded him by the Fifth Amendment? It would seem, however, that these questions can be answered by a determination as to whether at the close of the People's case there was a triable issue to be submitted to the jury.

In the case of *U.S. v. Rosengarten,* 357 Fed. (2) 466 the Court found that the Government's case in chief at the time the defendant made a motion for acquittal was sufficient to support defendant's conviction beyond reasonable doubt. Also see *U.S. v. Moore,* 375 Fed. (2) 877 where it was held:

> "There is respectable authority, however, holding that there is no prejudicial error in the trial court's reserving ruling on defendant's motion for judgment at the end of the Government's case where evidence at the time the motion was made suffices to present a jury question as to defendant's guilt."

On the other hand in case of *Jackson v. U.S.,* 250 Fed. (2) 901 the issue of self incrimination is inferred in the decision rendered therein:

> "The reservation to a defendant of the right to offer testimony after the denial of a motion for acquittal made at the close of the Government's case would be a futile thing if the Court could reserve its ruling and force the defendant to an election before resting and being deprived of the motion. The introduction of evidence after the denial of a motion at the close of the prosecution's case waives any error in the denial of the motion."

The case of *Cephus v. U.S.,* 324 Fed. (2) 896 contains this excerpt:

> "Grant of defendant's motion for acquittal at close of government's case is mandatory if the government's case is insufficient and trial judge has no discretion to reserve his ruling on the expectation that the defendant would testify." (Syllabus)

To summarize:

A. Where a motion for acquittal is denied a defendant who offers evidence subsequent thereto waives any claim as to the sufficiency of the Government's case;

B. Although a trial judge cannot take such motion for acquittal under advisement there is authority to the effect that the defendant does not waive any claim as to the sufficiency of the Government's case and should be acquitted if at the time such motion was reserved, the Government case in chief was not sufficient to support his conviction beyond reasonable doubt.

C. In the light of *Chapman v. California,* 386 U.S. 20 and *Spivak v. Klein,* 87 S. Ct. 626 a penalty was placed upon defendant's right against self incrimination in the case at bar by the reservation of such motion for acquittal.

2. Respondent in its brief contends that the trial judge conducted a proper investigation of the incident which occurred in the presence of a juror and cites *U.S. v. Miller,* 381 Fed. (2) 539 in support of such contention.

In that case the trial judge fully investigated the incident. It appeared that some one had talked to a juror about the case at a social gathering who in turn mentioned the incident to two other jurors. All three were questioned by the Court about the incident and whether it would affect the decision of any of the three. The opinion rendered in that case contains this citation:

> "The case is entirely different from *Remmer v. U.S.,* 347 U.S. 227, 74 S.Ct. 450, 98 L. Ed. 654 (1954) where the trial court apparently did not interview the juror and the record did not show what actually transpired as the later opinion made clear. 350 U.S. 379, 380, 76 S. Ct. at 427. It was the paucity

> of information relating to the entire situation coupled with the presumption which attaches to the kind of facts alleged that made manifest the need for a full hearing."

In the case at bar the juror in question was never questioned; the facts were never revealed to the jury. No proper investigation was made of the incident by the trial judge. His failure to do so constituted defendant's denial of a trial by an impartial jury.

3. Respondent in its brief admits that the *Miranda* decision of this Court was applicable at the time of interrogation and in effect that defendant's demand for the presence of an attorney should have been heeded by the arresting officers and any subsequent interrogation of him by them was illegal. It promises in the future to avoid such conduct. The cases cited by respondent are not in point.

In the case of *U.S. v. Fisher,* 387 Fed. (2) 169 the defendant was not under arrest. *Santoro v. U.S.,* 388 Fed. (2) 113 is not in point and contains this excerpt:

> *Escobedo v. State of Illinois,* 378 U.S. 478, 84 S.C. 1758, 12 L.Ed. 2nd 977 (1964) was decided before this case was tried, so the principle announced therein applies to this case. *Miranda v. State of Arizona,* 384 U.S. 436, 86 S.C. 1602, 16 L.Ed. (2) 694 (1966) was decided after this case was tried, and hence its principle does not apply.

Consequently in the light of *Miranda* the statements made by defendant to a police officer while in custody at the time he demanded to be represented by counsel were improperly admitted in evidence.

The petition for a writ of certiorari should be granted by this Court.

Respectfully submitted,

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